Central Law Journal.

ST. LOUIS, MO., OCTOBER 15, 1897.

The benefit to litigants in the Supreme Court of the United States, by the passage of the act establishing intermediate Federal Courts of Appeals is just beginning to show itself on the docket of the supreme court. When that court begins its sittings for the October term, in the course of a few days, it will have upon its docket one hundred and fifty fewer cases than it did at the beginning of the October term last year. This is a reduction of about one-fourth for the year. The cases to be passed upon by the court include some of importance, comprising the Nebraska maximum freight-rate cases, involving the right of a State legislature to fix a freight rate beyond which railroads cannot go in their charges; the Westinghouse air-brake case, involving the validity of patents of the Westinghouse company for applying the air-brake to long trains; the case of the Interstate Commerce Commission against the Alabama Midland Railroad Company, involving the construction of the long and short haul clause; the West Virginia railroad taxation case; the case of the New York Indians against the United States; an Oklahoma case, involving the right of taxation in an Indian reservation; the Utah eight-hour law cases, and others of less importance.

Case and Comment calls attention to the fact that the right of a Mexican to be naturalized in this country seems never to have been determined until the recent case of *Re* Rodriguez, 81 Fed. Rep. 337. In that case Judge Maxey decides that "whatever may be the *status* of the applicant viewed solely from the standpoint of the ethnologist, he is embraced within the spirit and intent of our laws upon naturalization." The right of a Chinaman to be naturalized was denied in *Re* Ah Yup, 5 Sawyer, 155, before congress had expressly prohibited such naturalization. The right of a native of British Columbia of half Indian blood to be naturalized was also denied in *Re* Camille, 6 Fed. Rep. 256. The same was decided in respect to a native of the Sandwich Islands whose ancestors were Kanakas, in *Re* Kanaka Nian, 4 L. R. A. 726. A Japanese was denied naturalization in *Re* Saito, 62 Fed. Rep. 126, and a dark yellow native of Burmah was rejected in *Re* San C. Po, 7 Misc. (N. Y.) 471. Except persons of African nativity or African descent, only "free white persons" can be naturalized under U. S. Rev. St. § 2169. Judge Maxey's decision is the first which extends the meaning of these words beyond their strict construction.

The right of citizens to publish criticisms of the official action of judges has been recently upheld by the Supreme Court of Wisconsin in what is known as the Eau Claire case, which will hereafter be cited as a precedent on a subject, about which there has been a dearth of authority. It appears that a lawyer of Eau Claire wrote a communication, which was published by the editor of a paper in the same city, charging that a judge who was a candidate for re-election was extravagant in the management of his court, was partial and unfair in his official conduct, and was influenced by corrupt motives. The same criticism was also made in an editorial article in the paper. The judge in question at first instituted contempt proceedings against his critics, and subsequently made an order adjudging them guilty of contempt for having filed affidavits alleging the truth of the statements made by them. The offenders were to be committed to jail but a writ of prohibition from the supreme court saved them from that punishment. The supreme court held that the action taken by the trial court was in excess of its jurisdiction, and points out the fact that the criticisms made upon the judge had no reference to any action of his in connection with a case then pending. Whether just or unjust, they were general in their nature, and referred to past conduct. The court says it is well persuaded that newspaper comments on cases finally decided prior to the publication cannot be considered criminal contempt, and that they do not obstruct the administration of justice, however much they may tend to prejudice the judge against whom they are directed. While it is of the first importance that judges should perform their grave duties unimpeded, it is equally important that the right of citizens and newspapers to criticise what they deem arbitrary, unworthy and corrupt con-

duct should be jealously preserved. The court says: "Truly, it must be a grievous and weighty necessity which will justify so arbitrary a proceeding whereby a candidate for office becomes the accuser, judge and jury, and may within a few hours summarily punish his critic by imprisonment. The result of such doctrine is that all unfavorable criticism of a sitting judge's past official conduct can be at once stopped by the judge himself, or, if not stopped, can be punished by immediate imprisonment. If there can be any more effectual way to gag the press and subvert freedom of speech we do not know where to find it."

NOTES OF RECENT DECISIONS.

INSOLVENCY—PREFERRED CLAIMS FOR LABOR—EDITORIAL WRITER. — In Michigan Trust Co. v. Grand Rapids Democrat, 71 N. W. Rep. 1102, decided in the Supreme Court of Michigan, it was held that employees of a newspaper corporation, whose work consists of writing editorials, the preparation of copy for the printers, direction of the make-up of the paper, proof-reading, reporting and gathering news, as they are engaged in intellectual rather than manual labor, are not entitled to the benefit of a statute of Michigan providing "that all debts which shall be owing for labor by any * * * corporation at the time * * * it shall become insolvent, shall be preferred claims against the estate of such insolvent debtor." It was further held that work performed by a mailing clerk, whose duty it is to address and otherwise deliver papers to the patrons, being mechanical and manual, is embraced within the terms of such statute.

COUNTY — LIABILITY FOR USE OF HORSE BY SHERIFF.—The Supreme Court of Wisconsin, in Randles v. Waukesha County, 71 N. W. Rep. 1034, found a case of "first impression upon which no precedent could be found." It was held that where a sheriff having a warrant for the arrest of a man charged with felony took the horse of a citizen and pursued and overtook the felon and the horse was overdriven and injured, the county was not liable for the value of the horse. "It has never been supposed," says the court, "that any duty rested on the county to furnish the sheriff's officers with horses to ride or drive in the service of process. It has usually been understood that such officers took their offices *cum onere*, and furnished their own conveyance. The officer, in making this arrest, was not the servant of the county, and the county is not liable for his action. He was engaged in a service due to the general public, and of no particular interest to Waukesha county, as a political organization. Kuehn v. City of Milwaukee, 92 Wis. 263, 65 N. W. Rep. 1030, and the cases cited. In such cases the county is not liable for the acts of its officers, unless such liability is put upon it by some statute. No statute declares a liability for such an act as this. Something is said in the argument about the power of the sheriff to call out the *posse comitatus*. No statute declares the liability of the county to persons called by the sheriff to form the *posse*. But the *posse comitatus* includes only the men of the county. It does not include the horses. The sheriff has no *ex officio* power to call out the horses."

EVIDENCE — PROOF OF PATERNITY.—It has always been a difficult matter for the courts to determine how far evidence of resemblance between persons should be admitted to prove relationship. In Copeland v. State (Tex.), 40 S. W. Rep. 589, the appellant was tried for larceny, and her defense being that the money had been given her by the prosecutor for the support of her grandchild, she offered the six weeks' old child in evidence to prove that the prosecutor was the father. It was held that the child was too immature in development to be inspected by the jury in comparison with the prosecutor. As the same court had previously held, in Barnes v. State (Tex. Mar. 24, 1897), 39 S. W. Rep. 684, that a child of three months old could not be offered for the same purpose, the decision could not well have been otherwise. The general rule is that evidence of resemblance, as testified to by other persons, will not be received, as being only matter of opinion. U. S. v. Collins, 1 Cranch Circ. 592 (1809); Keniston v. Rowe, 16 Me. 38 (1839); Eddy v. Gray, 4 Allen (Mass.), 435 (1862). In some States it is further held that the child cannot be brought before the jury for their inspection. Risk v. State, 19 Ind. 152 (1862);

State v. Danforth, 48 Iowa, 43 (1878), disapproving of Stumm v. Hummel, 39 Iowa, 478 (1874); People v. Carney, 29 Hun (N. Y.), 47 (1885); Hanawalt v. State, 64 Wis. 84 (1885); Robnett v. People, 16 Ill. App. 299 (1885); Clark v. Bradstreet, 80 Me. 454 (1888); Overlock v. Hall, 81 Me. 348 (1889). In most States, however, such inspection is allowed. Gilmanton v. Ham, 38 N. H. 108 (1859); Finnegan v. Dugan, 14 Allen (Mass.), 197 (1867); Paulk v. State, 52 Ala. 427 (1875); State v. Britt, 78 N. C. 439 (178); Gaunt v. State, 50 N. J. L. 490 (1888); especially if there is a question of mixed blood. Warlock v. White, 76 N. C. 75 (1877). In most of the cases in which the inspection was refused, though the reasons were stated in general terms, it will be found that the child was too young for any supposed likeness to be a safe guide in the determination of its paternity. In State v. Danforth (*supra*), the child was only three months old; in Clark v. Bradstreet (*supra*), the child was six months old, and it was held the evidence was too vague, uncertain, and fanciful; in Overlock v. Hall (*supra*), the child was six months old; Hanawalt v. State (*supra*), decided that a child less than a year old could not be admitted in evidence. There seems to be no fixed age limit after which the child will be admitted. In State v. Smith, 54 Iowa, 104 (1885), where the child was two years old, the jury were allowed to inspect, as it was considered that the circumstances differed from those of State v. Danforth (*supra*). The court said: "Though resemblance often exists between persons who are not related, still what is called family resemblance is sometimes so marked as scarcely to admit of mistake. We are of the opinion, therefore, that a child of the proper age may be exhibited to the jury as evidence of alleged paternity." The test of what is the proper age seems to be whether the child still retains the immaturity of features which render it unsafe for comparison; if so, as is plain in the case under discussion, it cannot be shown to the jury as evidence of paternity or other relationship.

WRONGFUL ATTACHMENT — MEASURE OF DAMAGES—EXEMPLARY DAMAGES.—It is decided by the Supreme Court of New Mexico, n Cunningham v. Sugar, that a plaintiff suing one who wrongfully seized his stock of goods under an attachment, cannot recover for lost profits for any time after that, when, with regard to all the circumstances, he could reasonably have had his stock replenished, and that injury to credit is too remote to be assessed in favor of one whose property is levied upon as the property of another. In this case it appeared that a vendee of goods sued a creditor of the seller for wrongfully attaching such goods as belonging to the seller. The evidence was sufficiently conflicting as to the *bona fides* of the sale to justify a submission of the question to the jury. It was held that the vendee was not entitled to exemplary damages, as the evidence did not show any gross negligence or malice on the part of such creditor. Bantz, J., for the court, says:

The principal matter in controversy is in regard to the correctness of the measure of damages applied to this case in the court's instructions to the jury. The court below authorized the jury to assess as damages, (1) the full value of the property seized, (2) the loss of reasonable profits in the business from the date of the levy of the attachment to the time of trial, (3) damages to business standing and credit by reason of the levy. Leaving out of view wrongs done from a corrupt motive, which will be considered when we come to the subject of exemplary damages, the universal and cardinal principle in all civil actions, whether *ex contractu* or *ex delicto*, is that "the person injured shall receive a compensation commensurate with his loss or injury, and no more." 1 Suth. Dam. 17; U. S. v. Smith, 94 U. S. 214; Brewster v. Van Liew, 119 Ill. 554, 8 N. E. Rep. 842. No one is held responsible for all the consequences of his wrongful act, but only for those consequences which are natural and proximate; that is, such as might reasonably have been expected under the particular circumstances to ensue; such as, according to the common experience and the usual course of events, might reasonably be anticipated. 1 Suth. Dam. 21; Wood's Mayne, Dam. (Ed. 1880), § 52; McDonald v. Snelling, 14 Allen, 290; Smith v. Bolles, 132 U. S. 125, 10 S. C. Rep. 39; Warwick v. Hutchinson, 45 N. J. Law, 61. Damages which flow as the necessary result of the wrongful act need not be specially pleaded, but are recoverable under general allegations. Those damages which do not necessarily flow from the wrongful act, but do flow as a natural and proximate consequence of it, are classed as special damages, and to guard against surprise to the defendant these must be averred specially. 1 Chit. Pl. 395; Roberts v. Graham, 6 Wall. 578; 1 Suth. Dam. 763; Uransky v. Dry Dock, 118 N. Y. 304, 23 N. E. Rep. 451; Butler v. Kent, 19 Johns. 223. For the conversion of personal property the measure of damage ordinarily is the value of the property at the time of the conversion and interest thereon to the day of the trial. This is the general rule established by the great weight of authority. 1 Suth. Dam. 488; Cattle Co. v. Mann, 130 U. S. 78, 9 S. C. Rep. 458; Seymour v. Ives, 46 Conn. 110; Fowler v. Merrill, 11 How. 375; Watt v. Potter, 2 Mason, 77 Fed. Cas. No. 17,291. This rule is especially true of articles

of merchandise which can be replaced from the commercial markets at pleasure. Interest is allowed as damages for the deprivation of the use of the property, and this is the only damage which can ordinarily flow from the wrong. Whenever a different rule is to be applied, it is because peculiar circumstances introduce new elements, calling for the allowance of special damages in lieu of interest. To seize and convert the stock in trade of an established business not only involves the loss of the value of the property to the owner, but may also carry with it as a natural and proximate consequence the interruption of his business, and thereby loss to him of profits and trade. If the merchandise may be bought at will in the market, the taking of his stock in trade would be merely a temporary interruption of his business; and it must be remembered that the wrongful act consisted not in interrupting the business, but in the seizure of the property, and therefore the special damage could only continue so long as the interruption may reasonably continue as the natural and proximate consequence of the wrongful act. The question is not what plaintiff may have gained as the fruit of an unrealized speculation, but what he has lost by the act of the defendant. Smith v. Bolles, 182 U. S. 129, 10 S. C. Rep. 39. In the case at bar the property was an ordinary stock of merchandise. It was seized on January 30th, and Sugar (plaintiff below) resumed business, and realized the profits of it. In Crymble v. Mulvaney, 40 Pac. Rep. 501, the Colorado supreme court say: "The profits resulting from an injury to the business after its resumption, and until the commencement of the action, and the loss of credit, were too remote and speculative, and are not allowable under the clear weight of authority." The same rule was made in Anderson v. Sloane (Wis.), 40 N. W. Rep. 222. If he can recover from the defendants for the same period, he would be making the defendants pay again after the interruption of his business had ceased. The court's instruction authorizing recovery of profits up to the time of trial was, therefore, clearly erroneous.

We will now turn to the question as to the proper rule on this subject. It seems quite clear that when the loss of profits may be assessed as damages, the period for which they may be recovered cannot depend upon the time when the plaintiff may have chosen to replenish his stock and resume business. If it did, he might wait at ease till the period of limitation was about to expire, and, without actually incurring the hazards of mercantile pursuits, recover the estimated profits of a long period of idleness. In Luce v. Hoisington an ox had been seized under attachment, and in an action for damages it was held that the failure to raise a crop by reason of being deprived of the use of the ox was not the natural or proximate cause of the wrongful levy. The plaintiff could not allow his land to go uncultivated, and then ask the jury to speculate as to his loss. 56 Vt. 436. In Luse v. Jones, 39 N. J. Law, 707, the action was for wrongfully seizing a boarding house keeper's furniture, and she was allowed to recover damages to her business through the loss of boarders, and by having to turn others away in the interval "before she could, with proper diligence, furnish her house." In Allison v. Chandler, 11 Mich. 555, though damages were allowed for injury to business by disturbing a tenant's possession of a storeroom, he having an established business at that place, the court say: "Where, from the nature and circumstances of the case, a rule can be discovered by which adequate ompensation can be accurately measured, the rule would be applied in actions of tort as in those upon contract. Such is quite generally the case in trespass and trover for the taking or conversion of personal property, if the property (as it generally is) be such as can be readily obtained in the market, and has a market value." In France v. Gaudet, L. R. 6 Q. B. 199, the action was for conversion of a quantity of wine. No other wine of the same brand and quality was to be had in the market, and the owner had procured a purchaser of it at a certain price. The queen's bench held that the measure of damage was the actual price at which the wine could have been so sold. This, of course, included the profits. But, say the court, per Mallor, J.: "Under ordinary circumstances the direction to the jury would simply be to ascertain the value of the goods at the time of the conversion; and, in case the plaintiff could, by going into the market, have purchased other goods of like quality and description, the price at which that could have been done would be the measure of damages. It was, however, admitted on the trial, in the present case, that course could not have been pursued, inasmuch as champagne of the like quality and description could not have been purchased in the market, so as to enable the plaintiff to fulfill his contract with Capt. H." It was not deemed necessary in that case to determine whether notice of special circumstances of damage is or is not necessary on trover, in order to recover from them; but the learned judge was inclined to think that either express notice must be shown or arise out of the circumstances of the case. See Sedg. Dam. (4th Ed.) 559. If by reason of distance from the supply market, or like circumstances, an interval must reasonably elapse before business can be resumed, the loss of profits or injury of business by the diversion of trade during that period may be shown, as the natural and proximate result of closing up a mercantile store; but this must be based upon actual conditions previously existing for a period sufficiently long to afford reasonable certainty to it as evidence of damage. In Minnesota it is held that the evidence is limited to cases where the business had become so established at the time of interruption as that a uniform and actual condition of profits and losses could be shown with reasonable certainty, otherwise the profits would be purely speculative. Casper v. Klippen (Minn.), 63 N. W. Rep. 737; Goebel v. Hough (Minn.), 2 N. W. Rep. 849. While the law requires that damages must be proved with certainty, there is nothing requiring a higher degree of certainty upon that than any other branch of the cause, and as upon other matters the proofs may be probable and inferential as well as direct and positive. Much must be left to the good sense of the jury under guarded and discriminating instructions. In measuring the reasonable time within which the replenishing of stock should occur, regard must be had to all the surrounding circumstances; and for that period loss of profits and injury to business may be assessed, but beyond that period the damage would be 6 per cent. per annum to the time of trial, in addition to the market value of the goods taken. Injury to credit is too remote, and cannot be assessed in behalf of one whose property is levied upon under an execution or an attachment against another person.

We have thus far considered the case from the standpoint of compensatory damages. Exemplary damages are awarded when the wrong is done under circumstances indicating malice, wantonness, oppression or gross negligence. Railway Co. v. Prentice, 147 U. S. 107, 13 S. C. Rep. 261. When the wrong is committed by mistake in the assertion of a supposed

right without any actual wrong intention, and without such recklessness or negligence as evinces malice, or a conscious disregard of the rights of others, exemplary damages will not be warranted. 1 Suth. Dam. 724; 5 Am. & Enc. Law, 21. Hence such damages will not be allowed for seizure of the property of a stranger to the execution when not done wantonly. Phelps v. Owens, 11 Cal. 22. When attachment process is sued out or executed in good faith, though by a mistake not attributable to gross negligence, exemplary damages cannot be recovered. Beveridge v. Welch, 7 Wis. 465; Crymble v. Mulvaney (Colo. Sup.), 40 Pac. Rep. 501. The wrong must be willful, malicious, or the result of gross negligence, and it will be error to charge the jury that such damages can be recovered if defendants at the time had good reason to believe that the act was wrongful. Inman v. Ball, 65 Iowa, 543, 22 N. W. Rep. 666. Something more must be shown than "mere disregard of the rights of others." Wilkinson v. Searcy, 76 Ala. 176. The evidence in this case did not warrant the giving of an instruction upon exemplary damages.

CRIMINAL LIABILITY OF WAREHOUSEMEN.

It had become a custom among warehousemen, and particularly with that class of warehousemen with whom grain was stored by their customers, to sell and dispose of the property stored with them without the knowledge or consent of the real owners, and trust to luck to be able to replace it, when demanded, with property of like quality stored with them by others, or to pay for it at the market price, if not able to return or replace it. These warehousemen did not stop and consider that they were infringing upon the rights of the owners of the grain or other property stored with them; that they were selling and disposing of that which belonged to others, and upon which they had no claim, either legal, equitable, or moral, except a claim to be paid a reasonable sum for its storage when delivered to its owner on demand, or that they might not be able to return the property stored, or replace it with property of like kind and quality when demanded. This state of affairs continued for such a great length of time unchallenged, and the custom became so flagrant, that these warehousemen, storing the property of others for their own pecuniary benefit, eventually, to all appearances, reached the satisfactory conclusion that, whenever grain was deposited in a warehouse for storage, it became the property of the warehouseman and he had a perfect right to sell and dispose of the same whenever he saw fit to do so; and, more especially was this the case, if the grain, when delivered, was commingled with the grain of the bailee, or with that of others stored with him. In other words, it was contended, and sometimes successfully in criminal prosecutions against such bailees, that, in the case of grain thus stored in a warehouse, the transaction constituted a sale and not a bailment. Such has even been the holding of some courts in civil cases.[1] At length the people were aroused. They reached the sensible conclusion that they would, if possible, put a quietus upon these fraudulent and swindling operations, and learn even warehousemen that they must respect the property rights of others. When you touch men's pockets you touch most of them "where they live;" all of them may stand it for a time, some of them may "grin and bear it" all the time, but most will endeavor to ascertain if there is not some way in which their pockets can be protected. It is human nature to get all that one can honestly get and to hold with a firm grasp all that one is justly entitled to. Resort was had to the civil courts, but, unless the bailee had property which could be reached by execution, a judgment was a barren victory. Equity, it is true, would partition the grain still in store, if any, *pro rata* among those holding receipts, but in this way the parties regained only a small portion of that which rightfully belonged to them. Where one deposits in a warehouse wheat, which is mingled in a common mass with the wheat of others, this constitutes a bailment, and the depositor does not lose the right to reclaim it;[2] and if several depositors have wheat stored in a warehouse in a common mass, and a deficiency occurs from whatever cause, not occasioned by the fault of any such depositors, the loss must be borne by each of them in the proportion which the amount of his wheat bears to the whole amount deposited;[3] and in cases of this character the suit to establish and en-

[1] Rahilly v. Wilson, Assignee, etc. 1 Cent. L. J. 80; Chase v. Washburn, 1 Ohio St. 244, 6 Am. Law Review, 450; Lonergan v. Stewart, 55 Ill. 44.

[2] McBee v. Caesar, 15 Oreg. 62; Hall v. Pillsbury, 44 N. W. Rep. 673; Nelson v. Brown, 5 N. W. Rep. 718; Young v. Miles, 20 Wis. 615; Dows v. Eckstrom, 1 McCrary, 434; Greenlief v. Daws, 3 McCrary, 27; Ledyard v. Hibbard, 14 Rep. 213. And the bailee cannot deny the title of his bailor. Pulliam v. Burlingame, 18 Cent. L. J. 314.

[3] Brown v. Northcutt, 14 Oreg. 529.

force a ratable distribution of the grain remaining in store must be brought in equity.[4] Very little redress could, therefore, be had in courts of civil jurisdiction; the people then appealed to the courts of criminal jurisdiction, but here they were often told that they had not stored their grain, but had sold and had parted with all interest in it. The law made a contract of sale for them when they had made a contract of bailment only, and they met defeat. Men do not enjoy being swindled even when it is done under color of the law, and at length application was made to the legislature, the source from which the people can seek relief when the doors of the courts of justice are practically closed against them. Laws have been enacted in several of the States requiring every person operating, managing or controlling a warehouse for the storage of grain, etc., to deliver to the owner of the property stored a receipt, which receipt must bear the date of its issuance, shall state from whom grain received, the number of sacks, if sacked, the number of bushels or pounds, the condition or quality of the same, and the terms and conditions upon which it is stored. They further provide that no receipt shall be issued for any property not actually in store, and that no person operating any warehouse, etc., shall sell, incumber, ship, transfer, or in any manner remove, or permit to be shipped, transferred or removed beyond his custody and control any grain, etc., for which a receipt has been given by him, whether received for storing, shipping, grinding, manufacturing, or other purposes, without the written assent of the holder of the receipt. They also provide for the punishment of any violation of their provisions by these bailees. Statutes creating new offenses and their punishment are usually crude and experimental. Members of our legislatures are often men who are without any practical experience either in law or legislation, and frequently they know nothing even of the theory of either, consequently these acts require, in many important particulars judicial interpretation in order that their meaning and application may be rendered definite and certain. They are, however, of recent enactment, and but few cases have reached the courts of last resort, or received a construction that is binding and where written opinions are filed. Statutes of this character ought to be in force in all the States in order that the rights of the citizens may be fully protected, and when enacted they should certainly receive a liberal construction and be rigidly enforced, for, although they are penal in their nature, they are also remedial. In view, therefore, of the importance of this class of legislation to the people of the country, and especially those who are necessarily compelled to use warehouses, etc., for storage purposes, those cases, which have been passed upon by appellate tribunals, are of exceedingly great importance. It is a general rule of law that, when an act is made criminal by statute, unless knowledge or intent is by such statute made necessary in order to constitute the offense, neither knowledge nor intent need be alleged or proved.[5]

It will be apparent from reading these warehouse statutes that an intent, deliberately formed, to dispose of the property of another is not made necessary by the statutes to complete the offense, but that, if a warehouseman receive and receipt for the property of another to be held in store and then sells or disposes of the same without the written assent of the holder of the receipt, the offense is complete and the warehouseman is liable to the punishment prescribed. In the case of Sykes v. People,[6] where the defendant was indicted, under Sec. 25 of the Illinois warehouse act of 1871, imposing a penalty for issuing a receipt for property not actually in store, for issuing warehouse receipts to the Merchants' Loan & Trust Company on property claimed to be in store as collateral security for money loaned, when such property was not actually in store, it was held that the intent of the defendant might be shown for the purpose of fixing "the degree of criminalty and the punishment commensurate thereto," but that the intent to defraud the party to whom the receipt was issued was immaterial on the question of defendant's guilt. "The warehouse act was intended for the protection of the public, and the issuance, by a warehouseman, to a bank, of receipts, transferable by endorsement, purporting to be property in store

[4] Hamilton v. Blair, 23 Oreg. 65; Dows v. Eckstrom, *supra*.

[5] State v. Hartfiel, 24 Wis. 60; State v. Probasco, 63 Iowa, 400, 17 N. W. Rep. 607; Com. v. Emmons, 98 Mass. 6; Com. v. Zelt, 21 Atl. Rep. 7.

[6] 2 L. R. A. 461, 127 Ill. 111.

belonging to the bank, when, in fact, no such property was in store, and delivered by him to the bank as security for loans made by it to him, renders such warehouseman liable criminally under section 25 of the act, although he had no intent to thereby defraud the bank." And when the statute makes it criminal for a warehouse to dispose of, in any manner, property received for storage, and for which a warehouse receipt has been given, without the written assent of the holder of such receipt, not making the intent to injure or defraud the holder of said receipt an essential ingredient of the offense, it would seem to follow necessarily that the warehouseman was required to know that he had, at all times, in store a sufficient amount of the kind of property receipted for to take up at any time all outstanding receipts, and that, if during the bailment the warehouseman disposed of any of such property without the written assent of the holder of the receipt, and thus created a shortage so that he could not comply with his contract and deliver the property upon the presentation of the receipt, or the demand thereof without the presentation of said receipt, he would be liable criminally, although, at the time he disposed of the property, he had no intent to defraud the bailor, but intended to replace the property, disposed of by the purchase of other property of like kind. It is not the intent to defraud or injure any one, which makes him criminal, but it is the fact that he disposes of property, which the law says he shall not dispose of. And it seems that it is not necessary that the holder of the receipt should present the same or demand the property, it is sufficient that the property is not in store and could not be delivered. In State v. Rieger,[7] the court say: "It can hardly be necessary to add that the defendant had unlawfully shipped out this wheat, contrary to the provision of section 6, the offense was complete without any tender of the receipt or demand for the grain by the owner. The gist of the offense charged is the unlawful disposition of the grain, and not a failure to redeliver, it, on demand." * * * "One great object of this (Act) was to compel warehousemen to keep constantly on hand sufficient grain to meet all outstanding receipts." And it was further held that the following clause in said receipt, to-wit: "The conditions on which this wheat is received at this elevator are that J. H. Rieger has this option: Either to deliver the grade of wheat this ticket calls for, or to pay the bearer the market price in money for the same, less elevator charges, on surrender of this ticket," did not constitute a sale instead of a bailment, but only an option to buy and pay cash for the wheat, and, failing to do this, to deliver the wheat. Rieger could not hold the wheat and simply say he would pay. He could not exercise the option and buy on credit. He must pay cash, or deliver the wheat. These statutes usually provide the kind of receipt to be given by the warehouseman to the bailor for property received on storage and the terms and provisions to be inserted therein: in other words; they generally provide or prescribe what shall constitute a warehouse receipt, and that for a violation of any of the provisions of the statute in keeping and caring for any property for which such warehouse receipt has been given the warehouseman shall be liable, upon conviction therefor to be punished. But, suppose the warehouseman, seeking to avoid liability to the punishment denounced by the statute, executes and delivers to his bailor a receipt which does not comply with the provisions of the law, which is not a warehouse receipt as required, will he thereby exculpate himself from criminal liability? Can he say in defense, if prosecuted, the receipt I gave is not such a receipt as the statute required, and, consequently, I have not taken upon myself the duties and liabilities of a warehouseman, and, therefore, I can not be subject to a criminal prosecution? It is true I disposed of this wheat when I had no legal or moral right to do so, but, because I did not execute and deliver to the owner of the property the receipt prescribed by law, I am not guilty of any infraction of the statute, but of a breach of trust only? Certainly not. To permit him to do so would be to permit him to take advantage of his own wrong, to allow him, by failing to comply with one of the requirements of the statute, to, thereby, cheat, wrong and defraud his customer, and then excuse himself by one violation of the law, (which really worked no injury, if he honestly kept the property in store), for another violation thereof, which did work serious in-

[7] 60 N. W. Rep. 1087, 59 Minn. 157.

jury and wrong and invaded and destroyed the right of that other in and to his own property. In the solution of this question, fortunately, we are not left wholly to any simple theorizing, to the abstract idea of justice, but this question has been solved and settled by, at least one court of last resort. The Supreme Court of Indiana, in the case of Miller v. State,[8] say: "Counsel contend that this receipt is not in form such as required by the statute. If this were true, it would ill become appellant to try to take advantage of it. The statute required him to give the receipt, and prescribed the form. If, then, the paper given by him was in acknowledgment of wheat received by him for storage in the warehouse, as, indeed, it shows on its face, and if the paper so given as a receipt should fail in any particular to conform to the requirements of the statute, that would be rather an aggravation of appellant's wrong than an excuse for it. He ought to have given his receipt as required by the statute, and should not be heard to complain of his own fault in that matter." Under any other holding, if the precise form of receipt prescribed by the statute should be an essential prerequisite to a conviction, even a slight change in the wording of the receipt, or leaving out some small portion thereof intentionally would prevent the successful prosecution of any warehouseman. The receipt might, easily, be altered in such a manner that many people would not notice it unless their attention was specially directed to it.

It was, undoubtedly the intention of these warehouse acts to eliminate from all trials for offenses against them all questions of whether or not the act of storing constituted a bailment or a sale; and, as we have seen, some courts have given to these acts the construction which their authors evidently intended should be placed upon them. But it has been the fate of the Supreme Court of Oregon to place upon one of these acts a construction which simply emasculates it of all beneficial provisions for enforcing it. In the case of State v. Stockman,[9] where the receipt read as follows:

"Red Crown Mills

No. 1,078 Albany, Oreg., Sept. 18, 1894.

Received of E. D. Barrett, by self, two thousand one hundred ninety eight 15-60 bushel No. 1 merchantable wheat, subject to sacks and storage, .08 cents per bushel, if withdrawn from mill.

Red Crown Roller Mills

2,198-15-60 Bu. Lyons."

The court said: "The indictment charges that the defendant, as the manager of a warehouse for the storage of grain, received for storage therein the wheat in question, issued a receipt therefor, and afterwards sold, shipped, transferred, and removed the same from such warehouse, and beyond his control, without the written assent of the holder of the receipt. In order to sustain this charge, it was incumbent upon the State to prove that the wheat in question was in fact placed in a warehouse, within the meaning of that term as used in the statute and in addition thereto, that it was placed therein on storage. A failure of proof in either particular would necessarily be fatal to the prosecution." The statute on which the opinion was based reads as follows: "It shall be the duty of every person keeping, controlling, managing or operating, as owner or agent or superintendent of any company or corporation, any warehouse, commission house, forwarding house, mill, wharf, or other place where grain, flour, pork, beef, wool, or other produce or commodity is stored to deliver to the owner of such grain, flour, pork, beef, wool, produce, or commodity a warehouse receipt therefor, which receipt shall bear the date of its issuance, and shall state from whom received, the number of sacks, if sacked, the number of bushels or pounds, the condition or quality of the same and the terms and conditions upon which it was stored." And "no person operating any warehouse, commission house, forwarding house, mill, wharf, or other place of storage shall sell, incumber, ship, transfer, or in any manner remove or permit to be shipped, transferred, or removed beyond his custody and control, any grain, flour, beef, pork, wool, or other produce or commodity for which a receipt has been given by him as aforesaid, whether received for storage, shipping, grinding, or manufacturing, or other purposes, without the written assent of the holder of the receipt." A more comprehensive law might be enacted, but it seems that this is broad enough to effect the object it

[8] 43 N. E. Rep. 440-442.
[9] 46 Pac. Rep 851.

was intended to accomplish. The court also says: "The facts are that at the time of the alleged crime the defendant was the manager of the Red Crown Roller Mills, a corporation owning and operating a flouring mill in Albany, Oregon, and engaged in the business of manufacturing flour and other mill products for sale. A part of the mill building was used for the storage of wheat belonging to the company, and such as it might receive from the neighboring farmers. The wheat so stored was all mixed in one common mass, from which the company drew from day to day for the purpose of its business." Now, if this wheat was received by the company on storage, under this law it had no right to use it for any purpose "without the written assent of the holder of the receipt." Barrett was the holder of the receipt and had not given his assent, written or otherwise, to the use of the wheat by the company in any way. The question then was, had the company received this wheat on storage? The instrument construed was in writing, its construction was for the court, and it constituted not only a receipt, but a contract also; and the company having a warehouse for the storage of its own wheat and that of farmers, who might desire to store with it, it was engaged in the warehouse business, and the fact that it mixed the wheat received in one common mass did not constitute a sale. The transaction was a bailment and the storers of the wheat were tenants in common of the whole mass.[10] But aside from this, the statute does not use the word "warehouse" only in connection with the storage of grain, but the word "mill" also. So, construing this receipt in connection with the statute under which it was given, it was a warehouse receipt. The wheat was received "subject to sacks and storage, .08 per bushel, if withdrawn from mill." If not received on storage, why should there be an understanding that, "if withdrawn from mill," the company would be entitled to storage? Under this receipt, who had the sole right to determine whether or not this wheat should be withdrawn from the mill? Certainly not the company. Then only the storer had this right. In other words this receipt gave the bailor the right to elect whether or not he would sell the wheat to the company, or pay sackage and storage and "withdraw it from the mill." Until he actually exercised this right, the company, under the statute and under its contract, had no interest in the wheat, except that interest which a bailee for hire always has in the property in his possession. The company simply had this property in its mill or warehouse subject to the order and control of the bailor. The title thereto never passed out of the bailor, and consequently, never vested in the company, and it, therefore, never had the right to exercise acts of ownership over said property or any part thereof. It only had a lien for storage and sackage to the extent of 8 cents per bushel, if withdrawn; if it bought wheat at any time, the bailor would transfer to it the receipt which had been issued therefor, and the company would then become the owner of the property. Until this was done the bailor was the owner, and the company had no right to dispose of this property in any manner, and, if it did, its officers were liable to indictment. The bailor, not the bailee, had the right to elect whether he would withdraw the wheat from the warehouse and pay the storage and sackage of 8 cents per bushel as per his contract, or sell the wheat to the company and thus avoid the payment of such storage and sackage; and until the bailor not only exercised this right, but also until he elected to sell to the company, he was the absolute owner thereof, and the wheat held by the company was held by it as a bailee and not as a purchaser. No principle of construction known to the law could make a sale instead of a bailment out of this transaction. But by the construction the court has rendered the statute of no force or effect; in other words: by a species of judicial legislation, it has repealed an act of the legislative assembly duly and legally enacted. And it was held in State v. Stevenson,[11] that verbal consent to the shipment of the grain was no defense for the warehouseman, but the consent, to avail anything, must be in writing as required by statute.

D. R. N. BLACKBURN.

Albany, Oreg.

[10] McBee v. Caesar, 15 Oreg. 62; Hall v. Pillsbury, 44 N. W. Rep. 673; Brown v. Northcutt, 14 Oreg. 529.

[11] 52 Iowa, 701.

WITNESS—ATTORNEY—CONFIDENTIAL COMMUNICATIONS.

MINARD v. STILLMAN.

Supreme Court of Oregon, July 31, 1897.

In an action against an attorney for money which plaintiff alleges defendant has converted to his own use, and defendant alleges he paid to others at plaintiff's direction, defendant cannot be excused from testifying to whom he made the payment on the ground of confidential communications, though the payment be considered a communication, and defendant was attorney not only for plaintiff, but for the parties to whom the payment was made.

The purpose of this action is to recover of the defendant a balance of certain collections made by him as attorney for plaintiff upon fire losses on insured property consisting of a dwelling covered by one company, and household goods by another. It is alleged that defendant wrongfully concealed the receipt of such balance from plaintiff, and converted the same to his own use. The defendant admits the receipt of the same, but denies that it was concealed, or converted to his own use or benefit, and alleges that he paid it out by authority, and under the express direction of the plaintiff. The reply put in issue the affirmative allegations of the answer. The defendant became a witness at the trial in his own behalf, and testified, in substance, upon his examination in chief, that the agent and adjuster for the insurance companies represented to him that the drafts for the damages would be drawn payable to plaintiff, but that she was not to get a certain portion of the money, which represents the balance sued for, and that the adjuster did not want such balance to be placed in her hands. When asked why she was not to have such balance, he answered that it was an arrangement between the adjusters and special agents of the insurance companies in the matter of approving the loss. They had declined to approve the loss, and had threatened to arrest W. F. Minard, the husband of the plaintiff, for burning the building, and claimed that the household goods were not in the building at the time it was burned, and that W. F. Minard, who was acting as the agent of the plaintiff touching the adjustment and settlement, understood that such balance was not to be paid to him nor his wife. He further testified that he received the money through drafts upon San Francisco, which was deposited in the First National Bank to his credit, and that the balance in dispute was checked out by him to other parties, and that he received no part of it himself, or to his use or benefit; that when the whole amount was paid, the said W. F. Minard, the agent of the plaintiff, knew perfectly well that such balance was to be used in getting a settlement, and securing proof of these claims, and knew that he could not get them approved without it. On cross-examination he was asked to whom he paid such balance. This he declined to answer, saying it was a matter of confidence between these other parties, Minard, and himself. The court was thereupon requested to compel the witness to answer, which it declined to do upon the ground that the relation of attorney and client existed between the parties and the defendant. Defendant was then asked whether he had paid any part of it to Minard or his wife, and, having answered in the negative, Minard and his wife consented in open court to his testifying as to whom such balance was paid, and the witness continued: "I desire to state that I refuse to give that information, for the reason that this money was received and disposed of by me upon a matter of confidence. People that did not want to deal directly, and thought they could not deal safely with Ted (W. F.) Minard, dealt with me, and the money was paid out. * * * I was acting as attorney in confidential relations with the other parties." Thereupon the court made the same order refusing to compel the witness to answer, to which an exception was taken and allowed, and, judgment having been rendered in favor of the defendant, the plaintiff appeals.

PER CURIAM: The defendant contends that he occupies the position of attorney both for the plaintiff and the parties to whom he paid this balance; that the payments to such parties are in their nature privileged communications between attorney and client, and that he ought not to be compelled to make the disclosure. If it be conceded that this is a case wherein an attorney may properly represent all parties concerned in the settlement and adjustment, the rule seems to be well settled that in a controversy between such parties and a third person the attorney will not be compelled, without the consent of the parties, to disclose any communication made to him by them while in the exercise of such professional employment. Root v. Wright, 84 N. Y. 72; Gruber v. Baker, 20 Nev. 453, 23 Pac. Rep. 858. Upon the other hand, the rule is as well settled that in a dispute between parties themselves the attorney is not inhibited from making such disclosures where the communication was made in the presence and hearing of all concerned, or was intended for the mutual information of all. Michael v. Foil (N. C.), 6 S. E. Rep. 264, 269; Britton v. Lorenz, 45 N. Y. 51; Rice v. Rice, 14 B. Mon. 417; Carey v. Carey, 108 N. C. 267, 12 S. E. Rep. 1038; Hughes v. Boone, 102 N. C. 137, 9 S. E. Rep. 286; Gulick v. Gulick, 39 N. J. Eq. 516; Goodwin Gas Stove & Meter Co.'s Appeal, 117 Pa. St. 514, 12 Atl. Rep. 736; House v. House, 61 Mich. 69, 27 N. W. Rep. 858; *In re* Bouer's Estate, 79 Cal. 304, 21 Pac. Rep. 759; Hanlon v. Doherty (Ind. Sup.), 9 N. E. Rep. 782. The reason of the latter rule is stated in Rice v. Rice, *supra*, which is, in effect, that as the parties are all present at the same time, or are entitled alike to the same knowledge, the matter communicated is not in its nature private, and consequently that, as between the parties, and in so far as they are or can be concerned, it cannot, in any sense, be deemed

a subject of confidential communication made by one which the duty of the attorney inhibits him from disclosing to the other. And in conclusion Simpson, J., says: "The statements of parties made in the presence of each other may be proved by their attorneys, as well as by other persons, because such statements are not in their nature confidential, and cannot be regarded as privileged communications." Now, the case at bar presents a condition of affairs in which there is a dispute between one of the parties and the attorney, and it is contended by the defendant's counsel that the attorney stands in the position of a stranger, and that the rule should be applied as where the controversy is between one of the parties to the communication and a stranger. In this view we cannot concur. If it was a matter of common knowledge between the parties to the settlement as pertains to the persons to whom this balance was paid, the knowledge or the communications by which it was obtained by all cannot be considered as privileged in so far as the parties are concerned, and the attorney is not inhibited by any duty devolving upon him from communicating such knowledge from one to the other. The knowledge would be matter common to all, the attorney included, and for that reason is not privileged, as it concerns them all. So that in a controversy between one of the parties and the attorney the communication would be a matter of common knowledge between parties to that controversy, and the reason assigned why it is not privileged as between the parties to the settlement is equally as strong, and has like application as between one of the parties and the attorney. The court was therefore in error in not requiring the defendant to answer. The information which the plaintiff sought to elict would seem to be pertinent to the issue, which was whether defendant had converted any of this money to his own use. He claims that he paid it to certain parties under the direction of the plaintiff, and it is, therefore, an important factor in the logical course of an examination touching the transaction to ascertain and know to whom it was paid, and was, therefore, proper subject-matter respecting which to pursue a cross-examination of the witness. The judgment of the court below will therefore be reversed, and the cause remanded for such other proceedings as may seem pertinent, not inconsistent with this opinion.

NOTE.—*Recent Cases on Subject of Privileged Communications Between Attorney and Client.*—Communications from third persons, to whom an attorney has been referred by his client, are not privileged under Code Civil Proc. sec. 835, which provides that "an attorney or counselor at law shall not be allowed to disclose a communication made by his client to him," etc. *In re* Mellen (Sup.), 18 N. Y. S. 515, 63 Hun, 632. An attorney who is employed by a person only for the purpose of drawing up a deed and bill of sale to be executed to such person by another may testify, on behalf of the latter, as to what was said between the parties, and between them and himself for the purpose of showing that the bill of sale was intended as a mortgage. O'Neill v. Murray, 50 N. W. Rep. 619, 6 Dak. 107. An attorney was employed only to procure a bond for one charged with a criminal offense, and did so, taking from him a deed to indemnify him against loss on account of said bond, and afterwards the defendant in such criminal case borrowed money from another to settle the same, and the attorney, at the request of said defendant, quitclaimed the property to the lender as a security for such money. Held, that in a controversy as to the title of the land between the estate of the lender and that of said defendant, both being dead, the attorney was a competent witness to prove the above recited facts, and also an admission by the lender that the money he advanced upon such quitclaim deed had all been repaid. Rodgers v. Moore (Ga.), 13 S. E. Rep. 962, 88 Ga. 88. In an action to set aside a deed of land purchased by M, since deceased, conveying to her a life estate only, with remainder to defendant, on the ground of undue influence exerted over her by defendant, an attorney called in by M to draw the deed, employed by her professionally, to see that she got a good title, cannot testify in defendant's favor as to what was said to him by her when drawing the deed, under Civil Code, sec. 606, subd. 5, declaring that no attorney shall testify concerning a communication made to him in his professional character by his client, without the client's consent. Carter v. West (Ky.), 19 S. W. Rep. 592. In an action against an agent to recover a balance due on account of moneys received by the agent from the sale of property for plaintiff, where there was a conflict of evidence whether plaintiff or another person purchased certain property at a chattel mortgage sale, for a subsequent sale of which the agent claimed commissions, the admission of the testimony of plaintiff's attorney that he received a check from plaintiff with which to pay the fees of the person who made the sale under the chattel mortgage, and that he paid such fees therewith, was not a violation of Rev. St. sec. 4076, exempting an attorney from disclosing communications of a client, or advice given thereon. C. Aultman & Co. v. Ritter (Wis.), 51 N. W. Rep. 569. Communications made to a lawyer employed to draw a will, relative to the amount of land which the testator intended to convey by a certain deed theretofore executed, are not admissible in a suit to reform the deed after the testator's death, on the ground of mistake. Koontz v. Owens (Mo. Sup.), 18 S. W. Rep. 928. When an attorney, after drawing a will for testator, severed his professional relations with him, and subsequently, in a casual conversation, was told by testator that he proposed to give one of his legatees a certain sum in addition to her legacy in the will, such communication is not privileged, under Code Civil Proc. sec. 835, providing that an attorney cannot disclose a communication made by his client. Wadd v. Hazelton (Sup.), 17 N. Y. S. 410, 62 Hun, 602. The fact that confidential communications by a client to an attorney were made in the presence of a third person does not qualify the attorney as a witness in regard to such communications. Blount v. Kimpton (Mass.), 29 N. E. Rep. 590. The doctrine of privileged communications does not apply to testimony of a solicitor of patents who is not an attorney at law. Brungger v. Smith (Cir. Ct.), 49 Fed. Rep. 124. Under Act Aug. 4, 1887, which provides that no attorney shall be competent or compellable to testify to any matter or thing knowledge of which he may have acquired from his "client" by reason of "the anticipated employment of him as attorney," communications made to

an attorney who is consulted, but not afterwards employed, to undertake the service concerning which the communications were made, are confidential. Peek v. Boone (Ga.), 17 S. E. Rep. 66. Communications between an attorney and his client concerning proposed infractions of law are not privileged. Hickman v. Green (Mo. Sup.), 22 S. W. Rep. 455. Conversations between the parties to a mortgage in the hearing of an attorney employed to draft it, which do not embrace any communications made to him as an attorney or for the purpose of obtaining his advice or legal opinion, are not privileged within the meaning of Gen. St. 1878, ch. 73, sec. 10, which provides that an attorney cannot, without the consent of his client, be examined as to any communication made by he client to him, or his advice given thereon, in the course of professional duty. Hanson v. Bean (Minn.), 53 N. W. Rep. 871. Where an attorney who drew a will signs it as a witness at the request of testatrix, he is free, in an action to contest the will, to testify to any fact in regard to the will and its execution which he learned by virtue of his professional relations. *In re* Pitt's Estate (Wis.), 55 N. W. Rep. 159. Communications made by a client to an attorney while seeking professional advice as to the best method of defrauding his creditors are not privileged. Hamill v. England, 50 Mo. App. 338. The relation of attorney and client does not exist where the attorney, acting as notary public, takes the acknowledgment of a mortgagor to a chattel mortgage not written by the attorney, and communications made by the mortgagor to the attorney as to the purpose of its execution are not within Rev. St. 1889, sec. 8925, declaring communications between attorney and client privileged. C. Aultman & Co. v. Daggs, 50 Mo. App. 280. One who objects to the testimony of an attorney as relating to a privileged communication between attorney and client must prove that the communication was made to the attorney while he was acting for the client, or was for the purpose of obtaining advice. Mowell v. Van Buren, 28 N. Y. S. 1035, 77 Hun, 569. Where a widower consults his counsel about taking out letters on his wife's estate, and hands him her papers, including a deed which he had made to her in contemplation of marriage, the counsel is violating no professional confidence in testifying to this transaction and its date, and that after the widower's death, the papers having remained all the while in his hands, he found the signature to the deed erased. Turner v. Warren (Pa. Sup.), 28 Atl. Rep. 781, 160 Pa. St. 336, 34 W. N. C. 345. An attorney cannot disclose confidential communications made by a client while the relation continues; but those made after the relation has terminated may be proved, though they are substantially the same as those given while the relation existed. Brady v. State (Neb.), 58 N. W. Rep. 161. On an issue whether the purchaser of a stock of goods knew of the seller's intent to defraud his creditors, evidence by the purchaser's attorney that he informed the purchaser, shortly before the sale, that he had claims for collection against the seller, is not objectionable as a communication from client to attorney. Rosewater v. Schwab Clothing Co. (Ark.), 25 S. W. Rep. 73, 58 Ark. 446. One is not disqualified, by reason of having been an attorney for another, from testifying to statements made to him by the latter after he was no longer a practicing attorney. Doan v. Dow (Ind. App.), 35 N. E. Rep. 709. Where a person talks with an attorney, with a view to retaining him, the conversation is privileged, though the relation of attorney and client is never established between them. State v. Tally (Ala.), 15 South. Rep. 722. Where a client refers a person to his attorney for information in respect to any matter, the testimony of such person as to statements made by the attorney is competent, as the rule that the admissions of an attorney in conversation with third persons are not admissible against his client does not apply to such case. Galle v. Tode (Sup.), 26 N. Y. S. 633, 74 Hun, 542. The question whether communications by defendant to an attorney were made by defendant while consulting him professionally, or while employing him merely as a scrivener, so as not to render them privileged, is for the trial court. Childs v. Merrill (Vt.), 29 Atl. Rep. 532. The selection by the testator of the attorney who drew the will to act as an attesting witness is a waiver of the statutory privilege as to communications between attorney and client, and on a contest of the will the attorney may testify as to conversations between himself and the testator as to the character and contents of the will then desired. Pence v. Waugh (Ind. Sup.), 34 N. E. Rep. 860. Code, sec. 3642, provides that no practicing attorney shall disclose any confidential communication, unless the party in whose favor this prohibition is made waives it. Held, that a testator, by requesting the attorney who has drawn the will to witness it, waives the prohibition, and such attorney may testify as to testator's mental condition. Denning v. Butcher (Iowa), 50 N. W. Rep. 69. An attorney is incompetent to testify as to the contents of an insurance policy, if his knowledge thereof was acquired while acting in his professional capacity. Freeman v. Brewster, 31 S. E. Rep. 165, 93 Ga. 648. The fact that respondent in disbarment proceedings was enabled to defraud his client by reason of a corrupt scheme entered into by them to defraud the county, does not prevent the client from testifying as to such scheme. State v. Cadwell (Mont.), 40 Pac. Rep. 176. Code, sec. 3643, providing that no attorney, in giving testimony, shall disclose any confidential communication made to him in his professional capacity, does not prohibit an attorney from testifying, on an issue as to whether a deed to a decedent was intended as a mortgage, that he acted for decedent's administrator in collecting a note made by the grantor to decedent, and that on its payment the land covered by the deed was reconveyed to the grantor. Cadwell v. Melveldt (Iowa), 61 N. W. Rep. 1090. Communications by a client to his attorney of an intent to violate the insolvency law by permitting certain creditors to obtain preferences are not entitled to protection as confidential. Taylor v. Evans (Tex. Civ. App.), 29 S. W. Rep. 172. Where counsel for plaintiff, under leave of court, left the court room for the purpose of securing from the county clerk the original of a contract filed by his client to secure a mechanic's lien, and returned with a paper purporting to be such original contract, but which he claimed was not, if called to the stand as a witness he could not refuse to answer questions tending to establish the identity of the paper, on the ground that its contents were privileged. Warner v. Elevator Manufg. Co. v. Houston (Tex. Civ. App.), 28 S. W. Rep. 405. In an action arising under a will, the testator's attorney may testify as to conversations with testator occurring before the relation of attorney and client arose. Jennings v. Sturdevant (Ind. Sup.), 40 N. E. Rep. 61. Statements of fact made in good faith to an attorney-at-law, for the purpose of obtaining his professional guidance, are privileged communications, though the relation of attorney and client does not exist. Wade v. Ridley, 32 Atl. Rep. 975, 87 Me. 368. Information voluntarily intrusted to an attorney-at-law is not a privileged communication when

the relation of attorney and client does not exist. Home Fire Ins. Co. v. Berg, 65 N. W. Rep. 780, 46 Neb. 600. Statements made by an applicant for a pension, to one acting as his attorney in the matter, are privileged communications, and cannot be proved in an action upon a policy of life insurance subsequently applied for and obtained by the pensioner. Mutual Life Ins. Co. of New York v. Selby, 72 Fed. Rep. 980, 19 C. C. A. 331. Where testator's widow, after asking his surviving law partner to call at her residence after business hours, confers with him in reference to certain claims against his estate, in regard to her own personal income, and then turns the conversation to other matters, afterwards attempting to explain away his objection that the will of her husband, as presented for probate by her, was different from one whose terms were explained by deceased to him, she cannot insist upon the exclusion of his testimony as to what she said on the ground that it was privileged, as a communication to an attorney by his client. McDonald v. McDonald, 41 N. E. Rep. 336, 142 Ind. 55. Under Burns' Rev. St. 1894, sec. 505 (Rev. St. 1881, sec. 497), making confidential communications between attorney and client privileged matter, the fact that the relation of attorney and client once existed does not preclude such attorney from giving evidence of non-professional communications subsequently made to him by such client. Harless v. Harless (Ind. Sup.), 41 N. E. Rep. 592. Communications to an attorney with reference to a matter between him and his client, made in the client's presence, by one who retained him for the client, and was to pay him for his services, are not privileged, in an action by the client against the person making them. Frank v. Morley's Estate (Mich.), 64 N. W. Rep. 577. Communications by parties to an attorney acting professionally for all in the same transaction are not, as between such parties, privileged. Livingston v. Wagner (Nev.), 42 Pac. Rep. 290. A conversation between an attorney and a person relative to the person's being a member of a firm is not privileged merely because the attorney was counsel for him in certain matters, he not having been counsel for him relative to firm matters, and the conversation not having been at either of their places of business or in connection with any business between them. Stanfield v. Knickerbocker Trust Co. (Sup.), 37 N. Y. S. 600, 1 App. Div. 592.

JETSAM AND FLOTSAM.

REVOCATION OF WILL BY SUBSEQUENT MARRIAGE.

The Supreme Court of Wisconsin has recently decided, in Lyon v. Cole, 71 N. W. Rep. 362 (May 21, 1897), that under the statutes of Wisconsin, which give married women the absolute power of disposing of their property by will, the will of a single woman is not revoked by her subsequent marriage.

The common law rule was that the will of a man was revoked by subsequent marriage and birth of issue, but neither circumstance, standing alone, was sufficient to revoke. Christopher v. Christopher, Dick. 445 (1771); Doe d. White v. Barford, 4 M. & S. 10 (1815). But the will of a woman was revoked by marriage alone. Forse v. Hembling, 4 Rep. 60 (1588); Hodsden v. Lloyd, 2 Bro. Ch. 534 (1789). The reason for this difference was that, in the case of a man, only such a change in his circumstances as to alter the course of descent was held sufficient to constitute an implied revocation of his will; while, in the case of the woman, marriage, by destroying her right over her property, destroyed the ambulatory nature of her previous will. Therefore, the courts held that the will, being unable to retain one of its essential qualities, must be revoked by marriage. Where, however, the woman retains the right to devise during coverture, by antenuptial contract, as she has thereby the right to alter the previous will, she is so far a *feme sole*, and that will is not revoked by her marriage. Stewart v. Mulholland, 88 Ky. 40 (1888).

Following this idea, that the common law rule ceased when the reason for it ceased, the court, in the case under discussion, said that since a married woman is now, by statute, in Wisconsin, empowered to will as freely as if she were a man, the law in regard to the revocation of her will should be the same as it is in the case of a man. In other States, where marriage and birth of issue are still both necessary to revoke a man's will, they have, after the married women's acts, been held equally necessary to revoke a woman's will. Miller v. Phillips, 9 R. I. 137 (1868); Fellows v. Allen, 60 N. H. 439 (1881); Webb v. Jones, 36 N. J. Eq. 163 (1882); Noyes v. Southworth, 55 Mich. 173 (1884); Emery, Appellant, 81 Me. 275 (1889); Roane v. Hollingshead, 76 Md. 369 (1892). In *Re* Tuller's Will, 79 Ill. 99 (1875), the court said that the reason of the rule of implied revocation was that the marriage and birth of issue, in England, and marriage alone here, change the course of descent, and that therefore it was generally held in this country that marriage alone, of a man or woman, was a revocation of a previous will, as husband and wife are here each other's heirs; but that where the marriage did not alter the course of descent, as in this case, where the devisees were the children of the first marriage, and therefore heirs, there was no revocation. The same principle was followed in *Re* Ward's Will, 70 Wis. 251 (1887), but in the case under discussion the court said the question of inheritance was immaterial, and laid down the rule that marriage alone was never sufficient to revoke a woman's will.

On the other hand, in Massachusetts, though admitting that the law should be uniform as to both sexes, the court held that the fact that it was wrong about a man's will, and required both marriage and birth of issue to revoke, when it should, on the principle of *Re* Tuller's Will, *supra*, require only marriage, was no reason to make it also a wrong about a woman's will; and that as the statute said, "Nothing shall prevent revocation by implication from changed circumstances," that re-enacted the common law, and made the marriage of a woman revoke her will, and the question of the reasonableness of the statute could not be considered. Swan v. Hammond, 138 Mass. 45 (1884); Blodgett v. Moore, 141 Mass. 75 (1886); Brown v. Clark, 77 N. Y. 369 (1879), decided that as the New York statute said that the will of an unmarried woman should be revoked by her subsequent marriage, the rule embodied in the statute could not be dispensed with, because the reason on which it was established had ceased, by a subsequent statute giving married women power to will. But, as the reason for it has ceased, the statute is construed strictly, and held not to apply to the will of a married woman who remarries. McLarney v. Phelan, 90 Hun, 361 (1895).

England and Pennsylvania have statutes expressly declaring that the marriage of a man or woman revokes a previous will (in Pennsylvania only in proportion to the interest of the husband or wife under the Intestate Act). Some States have followed their example, while others, without a direct statute have

interpreted the reason of the common law as in *Re* Tuller, *supra*, that marriage in this country by altering the course of descent changes a man's or a woman's circumstances, and in so far as it alters the course of descent, and no further, operates as a revocation of a will. See Brown v. Sherrer, 42 Pac. Rep. 668 (Colo. 1895).—*American Law Register and Review.*

THE LAW OF STRIKES — RESPONSIBILITY OF UNION WORKMEN WHO STRIKE BECAUSE NON-UNION WORKMEN ARE EMPLOYED.

This question has come up in two or three recent cases. In the case of Gauthier v. Perrault, decided by the Court of Appeals of the Province of Quebec at Montreal on the 24th of February last, there was a division of opinion upon the question whether workmen who, without resorting to threats, violence, intimidation or other illegal means, quit work because a non-union workman is employed in the same establishment, incur any legal responsibility toward the latter. The majority of the court were also of opinion that the plaintiff, having left his work voluntarily, notwithstanding an intimation from his employer that he was at liberty to stay, had not suffered any damage recoverable at law. But this conclusion appears to be weak, when it is considered that it was impossible for him to do otherwise than quit his work because he could not do his work alone, and the departure of the union workmen engaged in the establishment involved the closing of the establishment.

Next comes the sound and wholesome decision of New York Court of Appeals, delivered in March last, in the case of Curran v. Galen, 46 N. E. Rep. 297; affirming 28 N. Y. Supp. 1134, mem. That case proceeds on the principle that public policy and the interests of society favor the largest liberty in the citizen to pursue his lawful trade or calling; for which reason, if the purpose of the organization or combination of workingmen be to hamper or restrict that liberty, and, through contracts or arrangements with employers, to coerce other workingmen to become members of the organization and to come under its rules and conditions, under the penalty of the loss of their positions and of deprivation of employment, their purpose is unlawful. The case was that the plaintiff, who had been discharged from employment by a brewing company, brought an action against the defendants for conspiring and confederating together to procure his discharge and prevent him from obtaining employment. The defendants in their answer alleged as a defense that they were members of a Workingman's Assembly, Knights of Labor, which had an agreement with the Brewers' Association, composed of the brewing companies, that all their employees should be members of the assembly, and that no employee should work for a longer period than four weeks without becoming such member; that what the defendants did in obtaining the plaintiff's discharge was as members of the assembly, and in pursuance of this agreement, upon his refusing to become a member. Plaintiff demurred to this defense. The court held that the defense was insufficient in law, and that the demurrer should be sustained. The decision of the court appears to have been unanimous, but one of the judges did not sit, and we are sorry to say that the opinion was *per curiam*, which indicates that no single judge of an elective court was willing to bear the brunt of writing an opinion which would displease such a powerful body of voters as the Knights of Labor.

Still another case of the same kind is Vegelahn v. Guntner, 44 N. E. Rep. 1077, decided by the Supreme Judicial Court of Massachusetts. This case related to what, we believe, is called picketing. The court held that the maintenance of a patrol of two men in front of plaintiff's premises in furtherance of a conspiracy to prevent, whether by threats and intimidation or by persuasion and social pressure, any workman from entering into or continuing in his employment, ought to be enjoined.—*American Law Review.*

TAXATION OF EXPRESS COMPANIES.

The Supreme Court of the United States has refused a rehearing in the express company tax cases and has reaffirmed the validity of State taxes assessed upon a proportionate part of the entire value of the property of the company in all the States as determined by the value of its capital stock. It was insisted that the State could tax only the tangible property found within its borders, but the majority of the supreme court in denying the rehearing say: "This contention practically ignores the existence of intangible property, or at least denies its liability to taxation. In the complex civilization of to-day a large portion of the wealth of a community consists in intangible property, and there is nothing in the nature of things or in the limitation of the federal constitution which restrains a State from taxing, at its real value, such intangible property." • • • "It is a cardinal rule, which should never be forgotten, that whatever property is worth for the purposes of income and sale, it is also worth for the purposes of taxation." The case is Adams Express Co. v. Ohio, 166 U. S. 185, decided March 15, 1897. The vote of the court is the same as on the decision of the same case on February 1, 165 U. S. 194. The four dissenting judges added nothing to the forcible argument of Mr. Justice White, made in expressing the opinion of the minority in that case.

The case goes beyond the decisions allowing the taxation of railroad and telegraph properties by the several States in proportion to length of their lines in each. In these there was the basis of the physical continuity and unity of the property, and the valuation of the parts was ascertained with reference to the value of the whole, but, in the case of the express companies, the property in the several States consists of separate horses and wagons in the several States and the unity consists only in their being combined in one business and under one control. Mr. Justice White, speaking for the dissenting judges, says that if there be such a rule applicable to the continuous lines of telegraph and railroad companies, "its existence pushes the power of State taxation as to these particular kinds of property at least to the confines of the constitution, and, therefore, if under the rule of *stare decisis*, the cases which announce it should be followed, they should not be extended." He insists that there is no real unity of property in unity of control, or unity of profits, and that in fact, if such a conception of unity were adopted, any manufacturer or merchant who owned property and carried on his business in different States would be liable to have his property in each State taxed with reference to the value of his business. He insisted also that the tax was a tax in one State upon property which did not exist there, and that it was in effect a tax upon the business done outside of the State, and that the business was the business of interstate commerce, which was not subject to be taxed by the States. He reviewed the decision of the supreme court on this subject, and insisted that the ruling announced in the present decision "greatly weakens or destroys the efficacy of the interstate commerce clause of the constitution."

It is not difficult to say on which side of this controversy Justice Bradley would have stood. It was his earnest wish to live long enough to succeed in establishing beyond question the position of the court on the federal control of interstate commerce, and since his death the rulings of the court have been uncertain and confusing. Justice White has taken up the fight with great vigor and ability, in this case, and is supported by Justice Field. Harlan and Brown, but the present decision is a long step beyond the railroad and telegraph cases, and it is not easy to tell what may be the consequences of it.—*New Jersey Law Journal.*

CORRESPONDENCE.

FRAUDULENT DEATH CLAIMS—MANNER OF DEFEATING IN INDIANA.

To the Editor of the Central Law Journal:

The most unpopular thing that a life insurance company can do is to resist a death claim. Rather than withstand the opprobrium and injury to its business, some companies will now go to the verge of complicity in rascality, by settling claims which are known to be down-right swindles. It is cheaper to pay than to litigate, say the officers. Public opinion is certain to run against the company. Hostile legislation is inspired, the right to do business in a State is denied, the press and lastly the court and jury are naturally inclined to champion the cause of the claimant. A new plan of meeting these difficulties has been successful in Indiana, which will doubtless prove efficacious elsewhere. Two members of a mutual life insurance company brought an action to enjoin said company from making an assessment upon them to raise proceeds to pay a fraudulent claim. They alleged that they were members of the company, contributors to its funds, and interested in its accumulations. They had requested the officers to resist payment and litigate the claim, alleging that it was fraudulent in that the said policy had been issued without the knowledge or consent of the alleged insured person contrary to law. Sec. 4902, Rev. St. 1894. The officers refused their request, and insisted on treating the claim as valid, and they had no other remedy but an appeal to the court. Their appeal was successful. The Supreme Court of Indiana says that policy-holders contributing to the funds of such company are interested in its funds so collected and are entitled to bring an action to restrain an unlawful assessment and payment of a claim. It is not necessary to specify all the steps taken to become members nor the amount of contributions. Such members have a right to enjoin the company from assessing and paying a fraudulent claim, where the officers have refused their request to resist the payment and insist on recognizing the validity of the claim on the ground of unpleasant notoriety instead of trying the cause on its merits in the courts. Carmen v. Carnell, Ind. S. C., 1897.

F.

BOOKS RECEIVED.

Handbook of the Law of Equity Pleading. By Benjamin J. Shipman, Author of "A Handbook of Common-Law Pleading." St. Paul, Minn.: West Publishing Co. 1897.

State Control of Trade and Commerce, by National or State Authority. By Albert Stickney, of the New York Bar. New York, Baker, Voorhis & Company, 1897.

The Canadian Annual Digest (1896) of the Canadian Cases Decided by the Judicial Committee of the Privy Council during the Year, with Tables of the Cases Digested, Cases Affirmed, Reversed or Specially Considered, and of the Statutes Referred to. By Charles H. Masters, Reporter of the Supreme Court of Canada, and Charles Morse, LL. B., Reporter of the Exchequer Court of Canada. Toronto: Canada Law Journal Company, 1897.

A Treatise on the Law and Practice of Foreclosing Mortgages on Real Property, and of Remedies Collateral thereto, with Forms, by Charles Hastings Wiltsie, of the Rochester Bar. With a Supplement, Bringing the Work Down to March, 1897, and Additional Chapters on Mortgage Redemptions. By James M. Kerr, of the New York Bar, Author of "Kerr on Real Property;" "Kerr on Business Corporations;" "Kerr on Homicide," etc., etc. In Two Volumes, Vol. II. Rochester, N. Y. Williamson Law Book Company, 1897.

HUMORS OF THE LAW.

Attorney (sternly)—"The witness will please state if the prisoner was in the habit of whistling when alone?"

Witness—"I don't know. I was never with the prisoner when he was alone."

"Here," roared the old judge to the son studying law with him, "you told me you had read this work on evidence and the leaves are not cut." "Used X-rays," yawned the versatile son, and the judge chuckled with delight as he thought what a lawyer the boy would make.

He had just been sentenced to thirty days for stealing and eating two apples. "Fifteen days," said one of the bystanders in the court room, "for stealing an apple? That's a high price."

"That's nothing," said another, "Adam took only one and was condemned to hard labor for life."

Judge—"Don't you think that this is a matter which could be settled out of court?"

Plaintiff—"Can't be done, your honor, I thought of that, but the cowardly defendant will not fight."

A Frenchman was convicted of killing his mother-in-law. When asked if he had anything to say for himself before taking sentence, he said, "Nothing, excepting I lived with her twenty-one years and never did it before."

Not a great while since a new justice of the peace was elected in ————county, Arkansas. He was a man of firmness and courage, and highly esteemed for many good personal qualities. In due time he took the oath of office and assumed the duties and difficulties incident thereto. His experience as a judicial officer, however, was not extended, nor was his knowledge of the law as profound as that of Lord Coke. Not many days after he took his seat as justice of the peace he was called upon by a suitor to exercise some of the functions of his office. Using fictitious

names, Richard Roe owed John Doe a certain amount of money due upon contract. Richard being far too indifferent about liquidating the sum according to John's idea, the latter betook himself to the office of our new justice and detailed to him the case, at the time filing, in the informal way permitted by law in Arkansas and, doubtless, elsewhere, under justice of the peace practice, his account against Richard, and asking a summons to the end that the said Richard might be brought to the bar of this justice and answer, plead or demur to the cause of action set up by his neighbor, John. The summons, of course, was accordingly issued directed according to law and placed in the hands of a constable who promptly served it on the defendant. When the return day, in the course of events, rolled around, the defendant made no appearance. The constable's return to the writ, however, convinced his Honor beyond peradventure that the recalcitrant defendant had received it in due time. But the justice was nonplused. He did not know what to do nor how to proceed (he had perhaps never heard of a judgment by default), he gathered his wits together, however, and finally remembered something about persons being in contempt of court. He struck a happy thought. This undoubtedly must be one of those cases. He had commanded this defendant to appear, and this official monition was contemptuously ignored. The justice accordingly gathered himself up and wrote out a warrant of arrest for the defendant, had him brought forthwith before the court on the charge of contempt, adjudged him guilty and committed him to jail for ten days.

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions, and except those Opinions in which no Important Legal Principles are Discussed of Interest to the Profession at Large.

1. ACCOUNTING — Settled Account—Re-opening.—One who seeks to surcharge and falsify a settled account has the burden of establishing the facts alleged by him.—FISK v. BASCHE, Oreg., 49 Pac. Rep. 981.

2. ADMINISTRATION — Decedents' Estates — Claims.—Pub. St. ch. 186, § 10, provides that if the supreme judicial court, upon a bill in equity filed by a creditor of a decedent's estate, whose claim has not been prosecuted within the time limited by law, is of opinion that justice requires it, and that such creditor is not chargeable with culpable neglect, it may give him judgment for his claim against the estate. Plaintiff prosecuted an action in the federal courts in Tennessee against a resident of Massachusetts, and recovered judgment in the circuit court, the circuit court of appeals, and the United States Supreme Court. In the meantime, defendant had died, rendering the judgment invalid; but his administratrix had continued the suit in his name, so that plaintiff did not discover the death until after two years therefrom, when the time for bringing actions against the estate had expired: Held that plaintiff was entitled to a judgment against the estate in equity by virtue of said statute.—EWING v. KING, Mass., 47 N. E. Rep. 597.

3. ADMIRALTY — Maritime Liens — Supplies.—Necessary supplies furnished to a vessel which has not obtained registry in any port, at a port other than that which is the residence of her owner, are supplies furnished at a foreign port, for which a lien lies against the vessel in admiralty, when furnished upon the credit of the vessel, and not upon the credit of the owner.—THE MARION S. HARRISS, U. S. D. C., E. D. (Penn.), 81 Fed. Rep. 964.

4. ASSIGNMENTS FOR CREDITORS — Assent.—One who assigned for the benefit of creditors owed two notes to executors. One note was signed by him individually, and the other, a larger one, was signed by a firm of which he and C were members. The executors signed a writing declaring an assent to such assignment, reserving their rights and remedies against all persons liable on said notes: Held, that they assented to the assignment, reserving their rights against C, and to any security which they had.—HASKELL v. HILL, Mass., 47 N. E. Rep. 586.

5. BANKS—Insolvency — Trust Deposit.—Where a depositor in a bank obtains from it two drafts upon another bank, paying therefor by checks against his deposit, the relation between the bank and the depositor with respect to such drafts remains that of debtor and creditor, and is not changed to a fiduciary relation, entitling the depositor, upon the bank becoming insolvent before the drafts are paid, to have the assets in the hands of its receiver applied by preference to the payment of such drafts in full.—JEWETT v. YARDLEY, U. S. C. C., E. D. (Penn.), 81 Fed. Rep. 920.

6. BILLS AND NOTES—Promissory Notes—Defenses.—In an action upon a promissory note by the payee against the maker, equitable defenses, such as want of consideration, partial failure of consideration, or want of delivery of the note, may be interposed. The payee of a promissory note is not a *bona fide* holder, in the sense of the law relating to *bona fide* holders of negotiable paper, and the law relating to *bona fide* holders has no application in an action between the original parties to the note.—HAGAN v. BIGLER, Okla., 49 Pac. Rep. 1011.

7. BILLS AND NOTES—Promissory Notes—Delivery.—Where a promissory note was signed and delivered by the maker to the payee's agent upon an express understanding and agreement that the latter was not to deliver the note to his principal except upon the happening of a certain event, but was to hold the note "for both parties" until it could be ascertained whether or not this event would happen; and where in fact it did not happen at all, and the agent, in violation of the understanding and agreement above mentioned, delivered the note to his principal, such delivery was not effective, or binding upon the maker. Under these circumstances the agent was, as to the matter of delivery, the mutual agent of both the other parties.—HANSFORD v. FREEMAN, Ga., 27 S. E. Rep. 706.

8. CARRIERS—Connecting Lines—Freight Charges.—A railroad company whose line is the last of two or more connecting railroads operated by different companies cannot, as a condition precedent to the delivery of an

article of freight to a consignee, exact from him the payment of freight charges advanced by it to a preceding company upon another article of freight shipped to the same consignee, and which was destroyed while on the line of the company last mentioned, and never delivered to the consignee at all.—ROBINSON v. DOVER & S. R. Co., Ga., 27 S. E. Rep. 713.

9. CONFESSIONS — Criminal Evidence.—Statements by accused, admitting that he purposely committed the homicide, are, strictly speaking, "confessions."—STATE v. PORTER, Oreg., 49 Pac. Rep. 964.

10 CONSTITUTIONAL LAW—Governmental Functions.—The act of December 20, 1893, "to provide for the filing, hearing, and determining of contest in contested elections in this State" (Acts 1893, p. 124), is not violative of paragraph 23, § 1, art. 1, of the constitution (Code, § 5015), which declares: "The legislative, judicial and executive powers shall forever remain separate and distinct, and no person discharging the duties of one, shall at the same time exercise the functions of either of the others, except as herein provided."—JOHNSON v. JACKSON, Ga., 27 S. E. Rep. 734.

11. CONSTITUTIONAL LAW—Indictment—Sufficiency.—In criminal cases the accused has the constitutional right to "be informed of the nature and cause of the accusation" against him. The indictment must set forth the offense with clearness and all necessary certainty to apprise the accused of the crime of which he stands charged, and every ingredient of which the offense is composed must be accurately and clearly alleged. The indictment must furnish the accused with such a description of the charge as will enable him to make his defense, and avail himself of his conviction or acquittal for protection against a further prosecution for the same cause, and also to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to sustain a conviction should one be had.—SLOVER v. TERRITORY, Okla., 49 Pac. Rep. 1009.

12. CONSTITUTIONAL LAW — Office and Officer.—The term "office" implies a delegation of a portion of the sovereign power to, and possession of it by, the person filling the office; a public office being an agency for the State, and the person whose duty it is to perform the agency being a public officer. The term embraces the idea of tenure, duration, and duties, and has respect to a public trust to be exercised in behalf of government, and not to a merely transient, occasional, or incidental employment. A person in the service of the government, who derives his position from a duly and legally authorized election or appointment, whose duties are continuous in their nature, and defined by rules prescribed by government, and not by contract, consisting of the exercise of important public powers, trusts, or duties, as a part of the regular administration of the government, the place and the duties remaining though the incumbent dies or is changed, is a public officer; every "office," in the constitutional meaning of the term, implying an authority to exercise some portion of the sovereign power, either in making, executing, or administering the laws.—STATE v. HOCKER, Fla., 22 South. Rep. 721.

13. CONSTITUTIONAL LAW — Retrospective Statutes—Appeal Bonds.—The act of the legislature approved February 26, 1895, to regulate the appeals from the justice of the peace and probate courts, and providing that when final judgment shall be rendered against the appellant in the district court, that on motion of the appellee, or any other person having an interest in such judgment, and after 10 days' notice of such motion to be served upon the appellant, the court may enter up judgment against the surety or sureties on the appeal bond for the amount of such judgment rendered against the appellant, is not invalid, because retrospective, when applied in cases where the appeal bond was executed before the act took effect. The legislature may provide for changes in the procedure of courts, which affect only the remedy, and do not affect the obligation of any contract, or the substantial rights of the parties.—YOUST v. WILLIS, Okla., 49 Pac. Rep. 1014.

14. CONTRACT—Acts of Parties—Construction.—Where the representatives of a city which owns and leases a railroad have for 15 years accepted the quarterly installments of rent reserved after maturity, and without interest, the lessees always claiming the right to pay at any time within 90 days without being liable for interest, the parties have, by the acts thereunder, placed a practical construction on the contract by which both are bound; the right to interest under its terms being open to doubt.—THOMAS v. CINCINNATI, ETC. RY. CO., U. S. C. C., S. D. (Ohio), 81 Fed. Rep. 911.

15. CONTRACT — Building Contract — Performance.—Where a contract provides that work is to be done according to certain plans and specifications, and materials furnished to be of the best, and to be to the entire satisfaction of the architect and owner, if it appears that the materials furnished were satisfactory, and the work was done according to the plans and specifications, the contractor is entitled to recover.—MCNEIL v. ARMSTRONG, U. S. C. C. of App., Fourth Circuit, 81 Fed. Rep. 943.

16. CONTRACTS—Family Relations — Presumptions.—When valuable services are rendered by one person at the request or with the knowledge and consent of another, under circumstances not inconsistent with the relation of debtor and creditor between the parties, a promise to pay for such services is ordinarily implied on the part of him who knowingly receives the benefit of them, and such promise is enforced on grounds of justice, in order to compel the performance of a legal and moral duty.—SAUNDERS v. SAUNDERS, Me., 38 Atl. Rep. 172.

17. CONTRACT—Implied Contracts—Statute of Frauds.—Where plaintiff conveyed his farm, for the benefit of defendant, to a third person, in consideration of defendant's oral promise to convey to him a certain other farm, and defendant, without plaintiff's consent, while such contract remained unchanged, put it out of his power to perform on his part by selling and conveying to others the farm he had agreed to convey to plaintiff, defendant is liable for the value of the property so conveyed by plaintiff for his benefit, though the executory contract in pursuance of which he received it be incapable of enforcement by reason of the statute of frauds, as his promise to pay therefor is implied.—MILLER v. ROBERTS, Mass., 47 N. E. Rep. 585.

18. CONTRACTS — Place of Performance.—Where it is the intention of the parties that a contract for a loan by a Georgia building and loan association to a resident of South Carolina shall be performed in the former State, the contract will be governed by the laws of Georgia, which provide that no fines, interest, or premiums paid on loans in such associations are usurious.—EQUITABLE BUILDING & LOAN ASSN. v. HOFFMAN, S. Car., 27 S. E. Rep. 692.

19. CONTRACT FOR SALE OF BONDS — Mutuality.—A contract for the sale of municipal bonds, to be delivered and paid for in the future, is not invalid for want of mutuality because of a provision that before acceptance of the bonds the seller shall furnish the buyer with a certified transcript of proceedings evidencing legality of issue to the satisfaction of the buyer's counsel, as such provision requires the buyer to submit the evidence to his counsel, and the counsel to pass thereon in good faith, and not capriciously.—MICHIGAN STONE & SUPPLY CO. v. HARRIS, U. S. C. C. of App., Sixth Circuit, 81 Fed. Rep. 928.

20. CORPORATIONS — Stock — Mortgages.—An agreement that payments of part of the amount of subscriptions to the capital stock of a corporation shall be secured by mortgage is void as against the creditors of the corporation, and cannot be the basis for relief on a cross bill seeking to enforce the agreement.—BONEY v. WILLIAMS, N. J., 38 Atl. Rep. 189.

21. COVENANTS—Enforcement—Equity Jurisdiction.—Where a covenant in a deed to land granting water privileges connected with a dam provided that the

covenantee should "be at one-half the expense of keeping the dam in repair," equity would not compel the grantee to contribute to building a new dam after the old one was swept away, since equity will not in the least enlarge the fair scope of such a covenant.—TRUDEAU v. FIELD, Vt., 38 Atl. Rep. 162.

22. CRIMINAL LAW— Homicide — Motive.—Where the prosecution rely for a conviction upon circumstantial evidence alone, and it is sought by the testimony of witnesses as to the conduct and acts of the deceased to show a motive upon the part of the accused for the killing, and it does not appear that such acts and conduct of the deceased were brought to the knowledge of the accused, held prejudicial error.—SON v. TERRITORY, Okla., 49 Pac. Rep. 923.

23. CRIMINAL LAW — Lascivious Cohabitation — Evidence.—To sustain a conviction of the crime of lewd and lascivious association and cohabitation under the provisions of section 2596, Rev. St., the evidence must show a dwelling or living together or cohabitation that is lewd or lascivious. It must show that the parties openly dwell together as though the relation of husband and wife existed between them. Proofs of occasional secret acts of illicit intercourse between them will not, of themselves, sustain the charge.—THOMAS v. STATE, Fla., 22 South. Rep. 725.

24. CRIMINAL PRACTICE—Direction to Acquit.—The court should not direct an acquittal unless there is no competent evidence tending to show accused guilty, or unless the evidence is so weak that a conviction would be attributable to passion or prejudice.—STATE v. COUPER, Oreg., 49 Pac. Rep. 959.

25. DEEDS—Record—Implied Notice.—A partition of land held by three brothers as tenants in common was made by mutual release deeds. The deeds releasing the interest of one of the tenants in the land divided and set off to his two brothers were not recorded within 15 days, as required by 1 Gen. St. p. 855, § 14, to make them valid against a subsequent judgment creditor of the transferror: Held, that no equity arose in favor of the grantees, as against the judgment creditor, to have any further conveyance from the judgment debtor.—H. C. TACK CO. v. AYERS, N. J., 38 Atl. Rep. 194.

26. EQUITY—Remedy at Law.—A bill seeking relief against a sale obtained to be made by a fraud is not demurrable because there is an adequate remedy at law, where it appears that the procedure in equity can afford the complainant more efficient modes of relief than are attainable at law.—MORSE v. NICHOLSON, N. J., 38 Atl. Rep. 178.

27. EQUITY JURISDICTION.—A bill which sets forth that the respondents have brought suit against the complainants for the alleged infringement of a certain patent, and that in advance of any adjudication of the validity of the patent the respondents have circulated among the customers of the complainants, with intent to destroy the complainants' business, circulars which are "false, injurious, malicious, scandalous, threatening, and intimidating," alleges facts which, if sustained, entitle the complainants to equitable relief.—LEWIN v. WELSBACH LIGHT CO., U. S. C. C., E. D. (Penn.), 81 Fed. Rep. 904.

28. FEDERAL COURTS—Depositions—Practice.—Depositions in causes pending in the United States courts can be taken only in the modes provided in Rev. St. U. S. § 861, and the following sections.—DESPEAUX v. PENNSYLVANIA R. CO., U. S. C. C., E. D. (Penn.), 81 Fed. Rep. 897.

29. FEDERAL COURTS—Suits against State Officers.—A suit by a non-resident insurance company to enjoin a State superintendent of insurance from revoking its license to do business in the State is not a suit against the State, so as to prevent a federal court from taking jurisdiction.—METROPOLITAN LIFE INS. CO. v. MCNALL, U. S. C. C., D. (Kan.), 81 Fed. Rep. 888.

30. FEDERAL RECEIVERS—Actions in State Courts.—While an action may be brought in a State court against the receiver of a corporation appointed by a federal court without previously obtaining leave of the latter court, when such action arises in respect of any act or transaction of the receiver in carrying on the usual and ordinary business of the corporation in connection with the property in his charge under the order of appointment, such a receiver cannot, without such leave, be sued in a State court in an action the purpose of which is to take from his hands or control property belonging to the corporation or held by it under a claim of ownership at the time the receiver took possession. The question of the receiver's right or authority to hold or manage such property, or any part thereof, cannot be thus raised.—HOLLIFIELD v. WRIGHTSVILLE & T. R. CO., Ga., 27 S. E. Rep. 715.

31. GARNISHMENT—Notice—Exemption.—A final judgment having been rendered against a garnishee after ample notice to defendant, defendant, three months thereafter, claimed that the property garnished was exempt: Held, that by failing to plead the exemption before such judgment he had lost his right to plead it, the question being *res judicata*.—NEW MEXICO NAT. BANK v. BROOKS, N. Mex., 49 Pac. Rep. 947.

32. GUARDIANS—Duties and Liabilities of Sureties.—The sureties upon the bond of a deceased guardian are liable to the ward for all the estate of the ward, of whatever nature, which came, or ought to have come, into the guardian's hands, and for all the profits thereof accruing while the guardian was in life, and which were not accounted for by him. It is not, however, incumbent upon them, after the guardian's death, to take possession of and preserve the ward's estate or to manage it for the purpose of making it produce an income for his benefit. These duties devolve upon the guardian's successor.—GARRETT v. REESE, Ga., 27 S. E. Rep. 750.

33. HUSBAND AND WIFE—Partnership.—Under the decision of this court in the case of Burney v. Grocery Co., 25 S. E. Rep. 915, rendered at the present term, a husband and wife may lawfully engage in business as copartners.—ELLIS v. MILLS, Ga., 27 S. E. Rep. 740.

34. INJUNCTION—Judgment against Guarantor.—The payors of a note, who have a legal defense to an action thereon, may enjoin the enforcement of a judgment rendered without their fault or laches against a guarantor of such note who holds valuable stock belonging to them as collateral security to indemnify him against the payment of the note.—BRADSHAW v. MINERS' BANK OF JOPLIN, U. S. C. C. of App., Seventh Circuit, 81 Fed. Rep. 902.

35. INSOLVENCY—Preferences.—A payment by an insolvent debtor on a secured debt may constitute an unlawful preference, under the insolvent law, where the security is inadequate. But it cannot be an unlawful preference if the payment is made out of the proceeds of the collateral security itself.—DULUTH TRUST CO. v. CLARK, Minn., 72 N. W. Rep. 127.

36. INSURANCE — Condition — Agents—Notice.—Facts communicated to an insurance agent, who, in behalf of the company represented by him, receives and acts upon an application for insurance, collects the premium, and issues the policy, are in law considered as having been communicated to the company itself, and the agent's knowledge of such facts is imputable to it.—PHENIX INS. CO. OF BROOKLYN v. SEARLES, Ga., 27 S. E. Rep. 779.

37. INSURANCE—Contract—Payment of Premiums.—Where one who has signed an application for an insurance policy refuses to accept the policy when executed and tendered, and pays no premium, there is no completed contract of insurance.—HOGBEN v. METROPOLITAN LIFE INS. CO., Conn., 38 Atl. Rep. 214.

38. LANDLORD AND TENANT—Failure of Title—Estoppel.—A tenant is estopped from denying his landlord's title, in so far as the right to the use and possession of the premises is concerned, although the title under which the latter first acquired possession and control thereof has reverted to the United States, and both the

landlord and tenant are claimants for said property' and applicants and contestants for title thereto under and by virtue of the laws regulating the disposal thereof.—YOUNG v. SEVERY, Okla., 49 Pac. Rep. 1024.

39. LIFE INSURANCE—Application of Reserve on Lapse of Policy.—Where the holder of a life policy has signed certificates of loan for 80 per cent. of the annual premiums paid by him, and the policy provides for the application by the company, in case of forfeiture for nonpayment of premium, of the net reserve, "less indebtedness to the company on the policy," to the purchase of extended insurance on the life of the assured, the company may deduct the amount of such loan certificates from the net reserve, and apply only the residue to the purchase of such insurance.—OMAHA NAT. BANK v. MUTUAL BEN. LIFE INS. CO., U. S. C. C., D. (N. J.), 81 Fed. Rep. 935.

40. MASTER AND SERVANT — Fellow-servants—Vice-principals.—An agent or employee of a corporation, who, in the discharge of his general duties, has charge of a particular branch or department of the corporation's business, as to which he acts in the capacity of a vice-principal, and as such employs and has control of all the subordinate servants who are to work under him, is, as to one of these whose duty it is to obey his orders, and who takes his orders from no other source, a *quasi* master, and not a fellow-servant, in the sense that the subordinate will have no right of action against the corporation for personal injuries caused without fault on his part by the negligence of the superior.—TAYLOR v. GEORGIA MARBLE CO., Ga., 27 S. E. Rep. 758.

41. MORTGAGES — Construction — Preferential Payments.—B held a due mortgage on corporate property. The company was unable to pay it, and B threatened foreclosure. With the assent of the company's officers and the consent of the mortgagee, M advanced one-third of the amount named in the mortgage, upon an agreement that he should be protected, by assignment or otherwise, and thus prevented foreclosure. Subsequently the mortgage was assigned to the wife of M, upon her payment of the other two-thirds, and her agreement to protect M to the amount of his previous payment: Held, that the first payment by M should not be credited in part satisfaction of the mortgage, at the instance either of the mortgagor or of a subsequent mortgagee, neither of whom contributed, in any way to pay the money sought to be credited.—MCINNES v. MCINNES BRICK MANUFG. CO., N. J., 38 Atl. Rep. 182.

42. MORTGAGES—Dower—Redemption.—A widow in possession as dowress, under her right of quarantine, of premises which had been mortgaged by her husband while single, is entitled to protect her estate therein by redeeming from such mortgage.—MERSELIS v. VAN RIPER, N. J., 38 Atl. Rep. 196.

43. MORTGAGES — Foreclosure—Personal Decree.—In the exercise of its chancery jurisdiction, a superior court of this State may render a valid judgment foreclosing a mortgage, and, having jurisdiction of the person of the mortgagor, may, in addition to the foreclosure, render against him a personal judgment in the same proceeding. The fact that the amount of the latter judgment is less than the sum for which the foreclosure was allowed is not a matter of which the defendant can complain.—BLOCK v. ALLEN, Ga., 27 S. E. Rep. 733.

44. MUNICIPAL CORPORATION—Action Against—City Warrant.—The holder of a city warrant, payment of which has been refused for lack of funds, is not restricted to proceedings by *mandamus*, but may sue the city thereon, notwithstanding Code, § 852, providing that execution shall not issue on a judgment against a public corporation, but that on presentation of a certified transcript of the docket, and memorandum of the satisfaction thereof, the proper officer of the corporation shall draw an order on its treasurer for the amount of the judgment, which shall be presented and paid like other orders on the treasurer.—GOLDSMITH v. CITY OF BAKER CITY, Oreg., 49 Pac. Rep. 973.

45. MUNICIPAL CORPORATION—Bids for Public Works.—A party whose rights are to be directly affected by official action which is judicial in its character is entitled to have an opportunity afforded him of being heard in relation thereto before such action is taken.—STATE v. BOARD OF CHOSEN FREEHOLDERS OF PASSAIC COUNTY, N. J., 38 Atl. Rep. 181.

46. MUNICIPAL CORPORATIONS—Powers—Streets.—Under a statute authorizing street paving to be done in a city when "the person owning real estate which has at least one-third of the fronting on the street, or portion of a street, the improvement of which is desired, shall in writing request the commissioners of streets and sewers to make such improvements," the city cannot, as an owner of property fronting on such street, join in signing such request, in order to make the same come up to the legal requirement as stated.—CITY OF ATLANTA v. SMITH, Ga., 27 S. E. Rep. 696.

47. MUNICIPAL CORPORATIONS—Taxation of Telegraph Company.—In an action by the city of Philadelphia to recover certain charges imposed by two municipal ordinances for the supervision and control of telegraph poles and wires, one of which ordinances imposed a charge of $1 per annum for each telegraph pole maintained within the city limits, and the other of which required, in addition to this pole charge, the annual payment of $2.50 per mile on all wires suspended above ground, it was testified, and uncontradicted, that the total cost to the city of inspecting and supervising the poles and wires by the department having charge thereof did not exceed 50 cents per pole: Held, that the ordinances were unreasonable and void.—CITY OF PHILADELPHIA v. WESTERN UNION TEL. CO., U. S. C. C., E. D. (Penn.), 81 Fed. Rep. 948.

48. PARTNERSHIP — Firm Creditors — Rights. — The right of a simple contract creditor of a partnership to have the assets of the firm first applied to the payment of firm debts does not amount to a lien upon the property, but is a mere equity, which vanishes when the partners part with their interest in the property.—STAAL v. OSMERS, Oreg., 49 Pac. Rep. 958.

49. PHYSICIANS AND SURGEONS — Police Regulations.—Act Feb. 27, 1895, prescribing a penalty against one practicing medicine or surgery without a certificate obtainable by passing an examination satisfactory to the board of health, is a valid exercise of police power.—IN RE ROE CHUNG, N. Mex., 49 Pac. Rep. 962.

50. PLEADING—Demurrer.—A demurrer on the ground that the complaint does not state facts sufficient to constitute a cause of action may be interposed after trial of issues raised by the pleadings, by virtue of Code, § 169, providing that an objection to demurrable defects in a complaint is waived, unless made by demurrer or answer, "excepting only the objection that the complaint does not state facts sufficient to constitute a cause of action."—GARRETT v. WEINBERG, S. Car., 27 S. E. Rep. 770.

51. PUBLIC LANDS—Mortgage of Homestead Claim.—The homestead act (Rev. St. U. S. § 2296), providing that no lands acquired thereunder "shall in any event become liable to the satisfaction of any debt contracted prior to the issuing of the patent therefor," merely prevents the appropriation of the land *in invitum* to the satisfaction of such debts, and does not prevent the homestead claimant, after issuance of the final certificate, and before patent, from giving a mortgage on the land for a debt then contracted or theretofore existing.—HOWARD v. RECKLING, Oreg. 49 Pac. Rep. 961.

52. PUBLIC LANDS — Receiver of Public Moneys—Liability of Sureties.—The sureties in the bond of a receiver of public moneys at a land office are not liable for moneys received by him as proceeds of the sale of Indian lands made under the act of congress of September 1, 1888, as such moneys are at all times, in equity, the moneys of the Indians, and not public moneys.—UNITED STATES v. ROGERS, U. S. C. C. of App., Ninth Circuit, 81 Fed. Rep. 941.

53. RECORDS—Inspection—Abstracters of Title.—Under the law as there laid down, an attorney at law has not, either in his own right, or in behalf of a corporation represented by him, the right, against the consent of the clerk of the superior court, and without paying his fees, to make copies of or abstracts from the books of record in his office for the purpose of compiling abstracts of titles to be used in a private abstract and land-title business carried on by such attorney or corporation. The right to inspect public records provided for in section 14 of the Code was not intended to embrace such a privilege. — LAND-TITLE WARRANTY & SAFETY-DEPOSIT CO. TANNER, Ga., 27 S. E. Rep. 727.

54. REMOVAL OF CAUSES — Amount in Controversy.—Where a suit is instituted in a State court against the receiver of a railroad appointed by the federal circuit court for that district without leave of the court by which he was appointed, and the amount in controversy is $2,000 or less, the receiver has no right to the removal of such cause to the court by which he was appointed, where his petition fails to show a state of facts making the removal necessary to the promotion of the ends of justice. — RAY v. PEIRCE, U. S. C. C., D. (Ind.), 81 Fed. Rep. 881.

55. REMOVAL OF CAUSES—Receiver.—Where a suit is instituted in a State court against the receiver of a railroad appointed by the federal court for that district without leave of the court by which he was appointed, the receiver may remove the cause to the court administering the trust, although the amount in controversy is less than $2,000. — SULLIVAN v. BARNARD, U. S. C. C., W. D. (Mo.), 81 Fed. Rep. 886.

56. SALES — Delivery. — Where there is no time fixed for delivery of timber that a seller is to deliver "over the rail of a vessel," other than that it should be ready for "spring shipment," the purchaser is not bound to have a vessel ready until after reasonable notice from the seller. — PARKER v. SELDEN, Conn., 38 Atl. Rep. 212.

57. SALES—Fraud — False Statements to Commercial Agency. — Though a merchant makes to a commercial agency a statement in some respects false, to be used in giving him a rating, which he knows is intended to be used by others as a basis for determining whether or not credit will be extended to him, yet, where no credit is actually extended until after the lapse of a considerable period, such, for instance, as 60 days, the person extending the credit and parting with the possession of his goods in pursuance thereof cannot assume that the statement is still operative, unless the person credited expressly reaffirms the truth of the statement, or at least knows or has reason for believing that he is obtaining the credit on the faith of the representations made in the statement, and by remaining silent misleads the other party.—TREADWELL, v. STATE, Ga., 27 S. E. Rep. 785.

58. SALES — Title — Bona Fide Purchasers. — Where plaintiff's grantee, having authority to dispose of a certain horse "in any way he sees fit, and at any price he sees fit," but being required to give plaintiff the proceeds thereof, transferred it fraudulently, by a sham sale, without consideration, to defendant's grantor, defendant, who purchased for value, but with knowledge of plaintiff's rights, acquired no title thereto as against plaintiff. — UFFORD v. WINCHESTER, Vt., 38 Atl. Rep. 239.

59. STATUTES — Enactment — Constitutional Requirements.—The provisions of the constitution requiring three several readings, the printing of bills, and an aye and nay vote on final passage of any bill, are mandatory. To ascertain whether or not the legislature, in the passage of a bill, complied with the requirements of the constitution, the court may go back of the enrolled bill to see if the journals of both houses of the legislature show that the requirements of the constitution were obeyed in the passage of the act in question.—COHN v. KINGSLEY, Idaho, 49 Pac. Rep. 985.

60. STATUTES—Enactment — Legislative Journal.—An enrolled act, signed by the proper officers, and filed in the office of the secretary of state, will be held to have been enacted as enrolled, though the legislative journals show that in its progress through the legislature an amendment was adopted which is not included in the enrolled act, as it will be presumed that the vote by which such amendment was adopted was reconsidered, and the amendment defeated. — MCKENNON v. COTNER, Oreg., 49 Pac. Rep. 956.

61. STATUTES — Subjects and Title — Amendment. — A statute that is invalid because its enactment is not for the entire class mentioned in its title may be cured by an amendment that extends the operation of the act to the whole of the titular class.—STATE v. HOWELL, N. J., 38 Atl. Rep. 180.

62. TAXATION—Exemptions.—Laws 1886, ch. 679, § 4, exempting certain property from "taxation," and taking effect upon a certain date, does not exempt such property from the taxes of that year, if they have been assessed before that date, though they have not been actually levied.—ÆTNA INS. v. MAYOR, ETC. OF CITY OF NEW YORK, N. Y., 47 N. E. Rep. 593.

63. TAXATION — Illegal Tax. — A tax levy which is clearly in excess of the amount which the board of county commissioners are authorized to levy for a particular purpose, is illegal.—ATCHISON, T. & S. F. RY. CO. v. WIGGINS, Okla., 49 Pac. Rep. 1019.

64. TAXATION — Railroads — Liability of Former Receivers.—Taxes against a railroad cannot be collected from receivers who had the control and management of the property during the years for which such taxes were assessed, as a part of the system owned by the company for which they are receivers, but whose connection with the road has ceased, except in an equitable proceeding, and upon proof that they have assets of such railroad in their hands, or have diverted its revenues.—COMER v. POLK COUNTY, U. S. C. C. of App., Fifth Circuit, 81 Fed. Rep. 921.

65. TAXATION OF RAILROADS—Method of Valuation.—The net earnings of a railroad, forming the basis of valuation for taxation, are determined by deducting the necessary expenses, under reasonably economical and prudent management, from the gross earnings under similar management. — STATE v. VIRGINIA & T. R. CO., Nev., 49 Pac. Rep. 945.

66. USURY—Cancellation of Securities.—Held, following Scott v. Austin, 32 N. W. Rep. 89, 864, 36 Minn. 460, that, by virtue of the statute, a plaintiff asking for the cancellation of securities for usury need not, as a condition of obtaining such relief, pay what he has received. Evidence held to sustain the finding and decision of the trial court to the effect that the securities here in question were usurious. — MATHEWS v. MISSOURI, K. & T. TRUST CO., Minn., 72 N. W. Rep. 121.

67. VENDOR AND PURCHASER — Fraud by Misrepresentation.—Where vendees purchased in reliance on the vendors' representation that the house in question was "a perfectly new house," or was "as good as new," when it was in fact an old building in part, which had been put in repair by the vendors, and some of the floor beams and weatherboards of which were rotten, the transaction may be rescinded at law, if such misrepresentation was made with knowledge of its falsity. —EIBEL v. VON FELL, N. J., 38 Atl. Rep. 201.

68. WATER RIGHTS—Grants.—The right to water for irrigation, when appurtenant to land, will pass with a grant of the land without mention being made thereof, although the grantor is not aware of the existence of the right.—TURNER v. COLE, Oreg., 49 Pac. Rep. 971.

69. WILLS—Trusts — Title of Trustees.—Where property was devised and bequeathed to a named person, to be held by him in trust for the sole and separate use of a daughter of the testator for and during the term of her natural life, with remainder to the child or children of such daughter living at the time of her death, and, in default of such child or children, then to the right heirs of the daughter, the legal title passed to the trustee as to the life estate only. The remainder thus created was a legal, and not an equitable, estate.—FLEMING v. HUGHES, Ga., 27 S. E. Rep. 791.